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Subject: NC Policy Watch: Governor's pipeline MOU could help protect migratory birds; lawmakers still claim it's an ugly duckling

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By Lisa Sorg - 3/7/2018

The Atlantic Coast Pipeline is like the obnoxious rich kid in college who has to buy his friends.

The North Carolina portion of the controversial \$5.5 billion natural gas project will run 160 miles through environmentally sensitive areas and communities of color in eight eastern counties. Of the 9,370 public comments the NC Department of Environmental Quality received about the ACP, 8,000 opposed it.

Even its boosters — economic development bigwigs and elected officials along the route — have been privately concerned that the financial promises pledged by Duke and Dominion Energy, owners of the ACP, were overblown.

So for the past year, the utilities, under the corporate name ACP, LLC, revved up the public relations machine. First, they trotted out boosters at public events. Then they tried to appease the environmentalists by promising to plant a bee-friendly pollinator corridor along the route. Last fall, once the Federal Energy Regulatory Commission (FERC) signed off on the ACP — one of the Trump administration's priority projects — the utilities tried to fast track state approval.

And finally, they agreed to pay.

In late January, Dominion signed a Memorandum of Understanding with Gov. Cooper that included a \$58 million voluntary mitigation fund or economic development and environmental reparations associated with the ACP. Duke and Dominion, the majority owners, would each pay half the amount upfront, with the rest due when the pipeline began operating.

Lawmakers, however, scuttled the deal last month in an omnibus bill that included crucial class-size provisions. Instead of economic development and environmental mitigation, the money would be reallocated to local school districts along the route. Cooper said last month that he will allow the bill to become law without his signature, but also acknowledged that Duke and Dominion are free to walk away from the voluntary agreement.

But judging from yesterday's Joint Energy Policy Committee meeting, lawmakers are clearly still upset about Cooper's unilateral deal-making. Legislators grilled a representative of the Department of Environmental Quality (DEQ) about the intricacies of the MOU, although the questioning appeared to be a tactic to build a case against the governor, who had announced the mitigation fund within hours of DEQ's approval of a key water quality permit. The timing has led some pipeline opponents to allege that there was a quid pro quo arrangement.

DEQ has maintained the permit was granted independent of the governor's MOU.

"Did you or your staff discuss the MOU funds?" Rep. Dean Arp, a Republican from Union County, asked Assistant DEQ Secretary Sheila Holman.

"No," she replied, adding that even when DEQ became aware of the MOU in January, "it didn't alter what we were doing."

Holman said DEQ's Division of Water Resources followed the law in issuing the water quality permit, known as a 401. (DWR sent the application back to ACP, LLC at least four times requiring it to provide more information.) The permit requires ACP, LLC to pay to mitigate environmental damage to streams, wetlands and buffers.

In February, ACP, LLC paid about \$6 million to the Division of Mitigation Services to help offset the damage to wetlands and streams. It should be noted that the amount is comparatively small considering Duke and Dominion each reported upward of \$5 billion in annual profits last year.

Those funds, Holman said, are separate from any money that would have come from the MOU.

“Will there be any environmental harm if the MOU funds are removed?” Arp said.

“We believe we’ve required adequate [stream and buffer] protections,” Holman replied.

“DEQ followed the established protocols,” said Rep. Jimmy Dixon, a Duplin County Republican. “I’m even more perplexed at the MOU. It seems unnecessary.”

However, there is at least one aspect of environmental damage that DEQ’s mitigation funds don’t cover: migratory birds.

“Perhaps that’s what the governor’s MOU was intended to address,” said Rep. Pricey Harrison, a Guilford County Democrat.

North Carolina is a major corridor for migratory birds — Tundra Swans, Cedar Waxwings, warblers and other songbirds. The Final Environmental Impact Statement for the ACP acknowledged that deforestation would harm bird habitats, including those for species that are just passing through.

ACP has agreed to conduct tree clearing outside of bird nesting seasons, but federal documents show that despite the mitigation projects, “forested areas would experience long-term to permanent significant impacts as a result of fragmentation.”

A 2011 MOU between FERC, which oversees pipeline approvals, and the US Fish and Wildlife Service set out to protect and minimize harm to migratory birds protected by several federal laws. No funding is established in that voluntary agreement.

In fact, FERC does not “require or encourage applicants to participate in compensatory mitigation to groups, governments or agencies,” but it does not prohibit it, either.

US Fish and Wildlife has delegated authority over the ACP and migratory birds to the NC Wildlife Resources Commission (WRC). The WRC examined the impacts of forest fragmentation with ACP staff, said Shannon Deaton, chief of the commission’s Habitat Conservation Division. That included a discussion of cost to offset the damage, but those figures were not immediately available.

US Fish and Wildlife is under the Department of the Interior, whose chief is Ryan Zinke. And in January, Audubon magazine reported, Zinke announced a proposal to gut protections for migratory birds that undoubtedly pleased the companies from oil, natural gas, wind, solar and manufacturing industries, who lobbied for the change.

Now businesses — such as pipeline construction companies — can accidentally kill the birds with impunity. Cooper’s MOU could have been one of the few financial mechanisms to protect them.